Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

GEORGE DAVID SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DONALD M. BINGHAM
ROBERT A. NANCE*
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
5801 N. Broadway, Suite 101
Oklahoma City, Oklahoma 73118
(405) 843-9909
ATTORNEY FOR PETITIONERS

April, 1994
*Counsel of Record

QUESTIONS PRESENTED

This case presents Sixth Amendment issues arising from joint representation. It arises from a prosecution for cultivating marijuana. Petitioner steadfastly denied he was responsible for growing marijuana on his mother's rural land, although he and an acquaintance were surprised by law enforcement agents while searching for a stray goat at the site of the marijuana. The same attorney represented Petitioner and the codefendant.

The Court of Appeals found no conflict of interest from this joint representation, and held that counsel's failure to identify Petitioner's brother as possibly the man seen on a hidden surveillance camera on an earlier occasion was not prejudicial. This case presents the following questions:

1. In a case in which the deadlocked jury, after once being instructed to continue deliberations, tells the trial court, "we feel the only evidence that is capable of persuading a change of the vote will be our viewing the videotape" of a man at the scene of marijuana cultivation,

   a. is defense counsel's performance deficient for failing to introduce evidence that defendant's brother could have been the man on the tape and met defendant's physical description, and had access to and frequented the location; and

b. was the defense prejudiced by counsel's failure to show another plausible suspect at the scene?

2. Was counsel's inability to urge the codefendant to testify to bolster Petitioner's testimony an adverse effect on his representation which violates the Sixth Amendment rights of Petitioner.

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Opinions Below.

The Opinion of the United States Court of Appeals for the Tenth Circuit and the Order denying rehearing are unreported, but are reproduced in the Appendix.

Jurisdiction.

The order and judgment of the Court of Appeals was rendered on December 17, 1993. Petitioner filed a timely petition for rehearing with suggestion for rehearing en banc. The Court of Appeals denied that petition by order dated February 2, 1994.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291. The District Court had jurisdiction pursuant to 21 U.S.C. §§ 841(a)(1), 846, 856(a)(1).

Constitutional Provision Involved.

The Sixth Amendment to the United States Constitution states:

> **Rights of the accused.**
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to **have the Assistance of Counsel for his defense.** [emphasis added]

STATEMENT OF THE CASE

The evidence at trial may be summarized as follows.

Federal agents discovered cultivated marijuana growing in a field located in a remote area of Oklahoma. The agents set up a hidden video camera which operated automatically by an infrared sensor.

This video camera did not produce any audio recording of what was being filmed.

The jury was shown considerable videotape (taken over several days), most of which consisted merely of the marijuana and surroundings, without any human subject-matter depicted. Two portions of the videotape, however, showed the presence of individuals. The first such portion showed a masked adult Caucasian male tending the marijuana, and at one point the mask was removed from his face, although he remained some distance from the video camera.

The second portion of the videotape (filmed on a different date) showed George David Smith and Robert Troy Bailey in the marijuana field, but did not show them engaged in any obvious criminal activity there.

The second such portion of videotape was recorded at a time when certain Federal and State agents happened to be hidden in the brush surrounding the marijuana patch. They had difficulty in hearing Smith and Bailey, but did hear some conversation which they interpreted as being incriminating, and then surprised Smith and Bailey by announcing their presence. Smith screamed and began to run, but stopped a short distance away and surrendered. Bailey did not flee.

Subsequently, the agents went to Smith's property and found 5 marijuana plants inside a small shed 150 yards from Smith's home. Found inside Smith's home were fertilizer and plastic which could be used to cultivate marijuana. Outside Smith's home was found a four-wheel motor vehicle, and four-wheeler tracks had been observed by the agents leading to the marijuana patch in question. The search

of Smith's home and its curtilage was conducted with Smith's consent.

At jury trial, Smith took the witness stand and testified that he was not the masked man shown in the first portion of the videotape which the jurors had already seen. He testified that he and Bailey had stumbled upon the marijuana patch while searching for a sick goat, and were looking it over when the agents jumped out of the bushes and surprised them. (Aplt. App. at 40-47, 52-53).

Smith denied making any incriminating statements and denied any prior knowledge of the marijuana patch. He further testified that the shed where marijuana was found is near a lagoon which is widely regarded as a public "swimming hole" frequented by area youths. (Aplt. App. at 50-51, 59-61).

A defense witness, James Wendell Nelms, confirmed that the shed is located next to the lagoon, a well-known "hangout" for teenagers and young adults who go there to swim and "party." (Aplt. App. at 14-18).

Another defense witness, Harland Stonecipher, testified that Smith has a reputation in the community as an exemplary citizen. Stonecipher also testified that he (Stonecipher) and others who reside in the area have had similar problems with people surreptitiously growing marijuana on isolated parts of their lands. (Aplt. App. at 19-28).

Finally, Smith's wife testified that she herself uses all the fertilizer found by the agents on her fruit trees and that she was not aware of any criminal conduct on the part of her husband. (Aplt. App. at 29-33).

During deliberations, the jurors requested that they be permitted to review the videotape, but the trial judge denied their request. (Aplt. App. at 70-74). After four hours of deliberation, the jurors informed the trial judge that they were unable to reach a unanimous verdict. The trial judge instructed them to deliberate further. (Aplt. App. at 75-76).

Later, the jury for the second time requested to have the videotape shown, stating:

> We are unable to reach a unanimous decision on any count. And we feel the only evidence that is capable of persuading a change of the vote will be our viewing the videotape taken on August 10th and 15th. No one feels their opinion will be persuaded otherwise without reviewing the tape. I'm doing the best I can. Signed Gary Johnson.

This time the trial judge relented, over defense objections. (Aplt. App. at 78-81).

After re-viewing the videotape, the jurors were instructed to go back to the jury room and continue deliberations. Approximately one hour later, the jury announced that it had reached a verdict.

In proceedings on defense Motions for New Trial defendants submitted affidavits which indicated that Petitioner's brother may have been the man on the earlier videotape, and that the codefendant Bailey was a drug and alcohol counselor and had wanted to testify and had significant character witnesses, but had been advised against testifying by joint defense counsel.

Petitioner's affidavit verified the following statements from his brief in support of his Motion for New Trial:

> David Smith has a biologic brother named Barry Smith. Barry is one (1) year younger than David. Barry is a man of the same approximate height, weight, and build as David. Both Barry and David Smith have dark hair whose length is medium, and both often wear Western attire.
>
> The marijuana field in question was located upon land owned by the mother of Barry and David Smith. Barry had unrestricted access not only to his mother's land but also to the land and home owned by David.
>
> Barry Smith frequented his mother's land and David's home. He had free access to the shed in which marijuana was found. Barry also had access to four-wheel vehicles, including the one found on David's property.

Appendix to Court of Appeals Brief at 86-87.

The Petitioner's affidavit itself stated:

> My name is George David Smith. I am one of the Defendants in this case. I have personal knowledge of the facts described in this Affidavit.

I have reviewed the Brief written by my lawyer, Donald M. Bingham, which describes my natural brother, Barry Smith, and Barry's access to my property and my mother's property. The statements in my lawyer's Brief about my brother Barry Smith are true.

My lawyer's statements in the Brief about my use of my mother's land and my cattle business activities with my mother are true.

I now believe that it was a serious mistake to use the same lawyer as my co-defendant Bob Bailey. The testimony of Bob Bailey would have helped my defense considerably, since Bob would have testified truthfully that he and I were not engaged in any marijuana cultivation or other illegal activity and that both of us are innocent of any crimes. Also, Bob would have testified truthfully that he and I did not make the statements testified to by Government witnesses at trial.

If I am granted a new trial, I intend to have my own lawyer, independent of the lawyer who represents Bob. If a new trial is granted, I would try to call Bob as a witness in my defense, and I believe that he would testify in my defense and confirm my version of the

> events on the day we were arrested.

Appendix to Court of Appeals Brief at 88-89.

The codefendant Bailey submitted the following affidavit to the District Court:

> I am an adult man of 49 years of age. At the time of my trial I was gainfully employed as an alcohol and drug counselor at the Recovery Way at Hugo, Oklahoma and had been so employed for over 2 years. I have no prior felony convictions. I have made no admissions against my interest in this cause and had absolutely no reason to not testify at my trial.
>
> It was my intention to testify at trial and explain my absolute lack of involvement in the criminal allegations made against me. Three reputable persons from my community agreed to and were available to testify as to my reputation for being a law-abiding truthful person. Those character witness were Judy Strickland (Executive Director of Youth Services at Hugo, Oklahoma), Bill Pitts (Program Director at

Recovery Way; he was my boss), and G.W. Collins (Assistant Chief of Police at Hugo). It was my intention that these people testify in my behalf at trial.

My trial counsel, Mr. Warren Gotcher, came highly recommended to my Co-Defendant and me. Together we hired Mr. Gotcher to represent the two of us. Although the concept of "conflict of interest" was used in my presence, I realize now that I did not understand its use in the context of legal representation. I was told by Mr. Gotcher in Mr. Smith's presence that the only effect of having separate counsel would be to have another attorney at the defense table and to increase my attorney fees, and the other lawyer would make a closing argument for me.

I have never had any involvement in trial matters and at all times I sought guidance from my attorney, but I did not receive meaningful guidance from him. Toward the close of trial, Mr. Gotcher spoke to me for the first time about the possibility of my not testifying. I had then and I have now absolutely no reason for not testifying, except that Mr. Gotcher suggested to me that it might be better if I did not testify. He did tell

me that the choice of whether to not testify was my choice; however, in the same breath he made it clear that although he had some reservations about the matter, that he was suggesting to me that I not testify. I was perplexed about his suggestion since I felt I needed to testify, had planned to testify, had no reasons to not testify, and had character witnesses available and willing to testify. However, when it came right down to it, I followed my lawyer's suggestion and did not testify. Mr. Gotcher said he could not see what could be gained by my testimony and then discharged my witnesses on Tuesday, November 3, 1992, the day before I was to testify.

I am not guilty of the crimes charged in the indictment and was with David Smith for the sole purpose of trying to locate the goat just as David Smith testified at trial.

All in all, I did not receive any clear cut advice from Mr. Gotcher about his professional opinion whether I should testify and was left to guess at whether I should testify. I was left to grasp at straws and guess at Mr. Gotcher's advice. I really became nervous when I learned my lawyer asked Harland

> Stonecipher, a man who had attended only a small part of the trial whether Mr. Stonecipher thought I should testify. Similarly, I was very puzzled by my lawyer asking my Co-Defendant of his opinion of whether I should testify. All of this gave the appearance to me that my lawyer did not know what he should recommend to me about testifying and for that reason could not or would not give me any clear cut advice on this matter. This further shook my confidence, but I did not have anyone to turn to but my lawyer. Instead of relying on my common sense, I relied on the advice I was paying for and I never should have done that. If I had understood the significance of not testifying I would have testified and demanded that he call my character witnesses to testify.

Appendix to Court of Appeals Brief at 99-101.

Petitioner submitted the following affidavit to the District Court as well:

> I am the Co-Defendant of Robert Troy Bailey. We were both convicted in this court by a jury on November 4, 1992 of the charges made against us.

Together Mr. Bailey and I hired Mr. Warren Gotcher to represent us at trial. Mr. Bailey and I discussed the case with one another prior to trial, both in the presence of Mr. Gotcher and out of the presence of Mr. Gotcher. Mr. Bailey has always maintained his innocence and intended to testify in his own behalf as well as intending to present character witnesses for himself. Although I am a lay person with no experience in the law, I could not imagine any reason why Mr. Bailey would not testify and present character witnesses just as I did. Mr. Bailey knew what might be called my "trial strategy" and I knew his. We were planning to take the same approach at trial until after I testified and then Mr. Gotcher began to raise the possibility of Mr. Bailey not testifying. This change in plans and giving up his right to testify made Mr. Bailey uneasy. I was present when Mr. Bailey would ask Mr. Gotcher for his advice on this newly proposed approach. Although Mr. Gotcher would generally respond in terms such as "it's Mr. Bailey's decision," you could tell that he was suggesting Mr. Bailey not testify.

> Mr. Bailey and I both relied on Mr. Gotcher, but his vague responses and suggestion that Mr. Bailey not testify left me and Mr. Bailey both uneasy. We were made more uneasy by Mr. Gotcher asking non-lawyers like Harland Stonecipher whether Mr. Bailey should testify. However, I know from knowing Mr. Bailey and our being in the defense of this case together that Mr. Bailey was relying on Mr. Gotcher to advise him on whether to testify and regardless of what Mr. Gotcher was saying about "it being up to Bob," that for some reason, Mr. Gotcher was really suggesting that Mr. Bailey not testify and that's the only reason Mr. Bailey did not testify.

Appendix to Court of Appeals Brief at 102-103.

Petitioner also submitted the affidavits of Judy Kay Strickland and Harland Stonecipher to the District Court:

> My name is Judy Kay Strickland. I am the Executive Director of Youth Services in Choctaw and Pushmataha Counties. Our agency provides

counseling services to youth and their families throughout the two counties. We work closely with the area schools, law enforcement agencies, the courts, and provide crisis intervention when needed. As Executive Director, I am responsible for the operation of programs in both counties and have a staff of three Counselors and an Administrative Assistant.

I was present at the Federal Courthouse in Muskogee, Oklahoma on Tuesday, November 3, 1992 to testify as a character witness on behalf of Robert T. Bailey. On this date two character witnesses were present to provide testimony on Mr. Bailey's behalf, Bill Pitts (Robert's employer) and myself. The third witness, Assistant Police Chief, G.W. Collins was unable to attend court on Tuesday, but would be available to testify on Wednesday.

The testimony that I was prepared to give related to Robert Bailey's reputation as a law abiding and truthful individual. I have known Robert both personally and professionally for several years. I have worked with Robert at Recovery Way, an Adolescent Alcohol and Drug Treatment Center, located in Hugo, Oklahoma, where he is

employed as a primary Counselor and maintains a case load of three to five adolescents for a duration of 30-40 days each. To the best of my knowledge, Robert had not been involved in any unlawful acts. His reputation throughout the county is one of honesty and concern for others.

I remained at the Federal Courthouse throughout the day on November 3, 1992 and on three occasions I attempted to talk with Robert's Attorney, Warren Gotcher, concerning my testimony. During a conversation in the hallway of the Courthouse at the close of court on Tuesday, I was informed by Mr. Gotcher that Robert's character witnesses would not be needed. I also overheard at this time, Robert's Attorney discussing with him that he did not need to testify on his own behalf; he could if he wanted to, but Mr. Gotcher felt that there was no need. At the time it appeared that Robert was seeking guidance and advise from his Attorney about testifying since he was unfamiliar with such proceedings, and his Attorney seemed to be offering no meaningful advice.

Appendix to Court of Appeals Brief at 104-105.

Harland C. Stonecipher, Petitioner's character witness, provided the following affidavit:

> TO WHOM IT MAY CONCERN:
>
> On November 3, 1992, I appeared in Federal Court in Muskogee, OK as a character witness for David Smith. Judge Seay was the presiding judge of this trial.
>
> I did not sit in the court room prior to my being called as a witness. I waited in the hall outside the court room; and as a result, I had no real knowledge of what had occurred during the trial.
>
> After appearing as a witness, I returned to the hall and waited there until the court adjourned for the day. Upon its adjournment, and after all jurors had left the court room, I approached the defense table around which attorney Warren Gotcher and defendants David Smith and Bob Bailey were standing.
>
> I asked Mr. Gotcher how did it go. Mr. Gotcher replied that David did a good job and he

> felt the jury believed him. Mr. Gotcher said to me, "I am having a problem deciding if I should put Bob on the stand. Mr. Gotcher said, "Harland, what do you think?" I was caught by surprise by his question and replied, "I don't know - I haven't heard any of the testimony in the trial - that is a call you will have to make. Mr. Gotcher said something to the effect, "I just don't know if I should or should not put him on." I responded to that by saying, "I would put him on the stand." Mr. Gotcher said, "I will think about that tonight."

Appendix to Court of Appeals Brief at 106.

SUMMARY OF THE ARGUMENT

The Court of Appeals departed from this Court's pronouncements in its failure to find prejudice arising from counsel's deficient performance in the present case. The inability of the jury to reach a verdict until it had reviewed the videotape makes it certain that the

tape was the crucial evidence which convicted George Smith. His counsel's failure to point out the obvious possibility that George Smith's brother Barry was the man on the earlier tape, and was thus responsible for the marijuana cultivation, was a clearly deficient performance which prejudiced Petitioner. The Court should grant certiorari to correct the Court of Appeals' departure from the proper constitutional standard.

Likewise, the Court of Appeals departed from this Court's pronouncements, and from those of other Courts of Appeals, on the Sixth Amendment law of conflicts of interest in joint representation. The Court of Appeals effectively required a finding of prejudice arising from what it conceded was a technical conflict of interest. This requirement is not founded in the

Sixth Amendment. Instead, the Court of Appeals should have found that joint counsel's inability to urge codefendant Bailey to testify was sufficient "adverse effect" to find a constitutional violation.

PROPOSITION I.

COUNSEL'S PERFORMANCE WAS DEFICIENT AND PREJUDICED PETITIONER

A. The need to explain the man on the earlier videotape.

Petitioner and his codefendant Bailey were arrested by law enforcement agents at the site of cultivated marijuana. The agents testified to supposed incriminating statements by Petitioner, while Petitioner testified to his innocent presence in the field, looking for a sick goat which had strayed from his rural home some two hundred yards away. Thus, the jury was confronted by conflicting accounts of the

arrest and had to make a credibility determination regarding the conflicting testimony.

The codefendant Bailey was ready, willing, and able to corroborate Petitioner's testimony and to bring credible character witnesses from law enforcement and from his employment as a drug and alcohol counselor.

Part of the evidence used by the government was a videotape taken by a concealed camera. That camera recorded the arrest, but also recorded an unknown man at an earlier time tending the marijuana. We can say with absolute certainty that this evidence tipped the scales of the credibility determination in favor of conviction because the jury reported that it could not reach a verdict on any count without reviewing this videotape again. After seeing that evidence a second time, the jury convicted both defendants on all counts.

It takes no great hindsight to understand the objective of defense counsel under these circumstances. Counsel needed to do everything possible to bolster the credibility of the Petitioner in his account of innocent activity. Two principal means were available to do that. First, Petitioner could call the codefendant who was eager to testify as a witness to corroborate Petitioner's account of events. Second, Petitioner could explain the identity of the unknown man in the earlier videotape.

Given the defense theory of the case, that of innocent presence at the scene of marijuana cultivation, counsel needed to explain who the man on the tape was if it was not Petitioner. Counsel made no effort to do so, even though Petitioner's brother Barry was the obvious and logical suspect.

Barry was one year younger than Petitioner and was of the same approximate height, weight, and build as Petitioner. Their hair and attire were similar. Barry had access to the site of the cultivation, which was on land owned by the mother of Petitioner and Barry. Barry had access not only to his mother's land, and to Petitioner's, he frequented both. Barry Smith had free access to the shed in which marijuana was found, as well as to four-wheel vehicles, including the one found on Petitioner's property after Petitioner consented to a search by the officers.

B. Counsel's deficient performance.

In the context of the Brady rule, the Tenth Circuit has evidenced its willingness to set aside even a capital murder conviction if the presence of another suspect creates a reasonable doubt as to the guilt of the defendant.

Bowen v. Maynard, 799 F.2d 593, 612 (10th Cir. 1986). As in the present case, in Bowen the presence of another suspect of the same physical description with a supposed motive to commit the crime cast doubt on the guilt of the charged defendant. Id. 799 F.2d at 611-12. Even without reading the opinion in Bowen, an experienced criminal defense lawyer should know that the presentation of another plausible suspect can create a reasonable doubt as to the guilt of a client charged with crime.

Counsel's failure to identify Barry Smith as possibly the man in the earlier videotape, especially in light of the Tenth Circuit's opinion in Bowen, falls below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Failure of counsel to investigate other plausible suspects who had motive, opportunity, and

ability to commit the crime, and to assert their guilt at trial, is ineffective assistance of counsel and cannot be justified by any strategic decision. Henderson v. Sargent, 926 F.2d 706, 710-12 (8th Cir. 1991). No conceivable trial strategy could justify foregoing so obvious a defense measure.

As we demonstrate below, this omission prejudiced the defense and the Court of Appeals departed from established precedent of this Court in holding otherwise.

C. The court below departed from this Court's pronouncements in overlooking prejudice.

The Court of Appeals resolved this issue by going directly to the prejudice requirement of Strickland. Appendix at 27. The court below summarized the other evidence against Petitioner and then stated that its "confidence in the outcome" was not undermined as a result

of counsel's alleged deficiencies. Appendix at 28.

This rather casual treatment of a constitutional violation was erroneous precisely because the Court of Appeals departed from this Court's formulation of the Strickland test for inadequate assistance of counsel. In the present case the jury heard the conflicting testimony regarding the events of the arrest, and saw the videotape, yet it could not come to a verdict. Only after it saw the tape a second time did it convict Petitioner. Thus, the totality of the evidence which the Court of Appeals relied upon to maintain the "confidence in the outcome" was insufficient to persuade the jury of Petitioner's guilt.

Particularly under these circumstances, no Court could reasonably have "confidence in the outcome", because the

jury manifestly was not confident of Petitioner's guilt even having heard the evidence relied upon by the Court of Appeals. Under Strickland the prejudice prong of the Sixth Amendment inquiry is whether, as a result of counsel's unprofessional errors, there exists a reasonable probability that the result of the proceeding would have been different. Id., 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Given this jury's demonstrated inability to reach a verdict until it reviewed the videotape, it is reasonably probable that the presentation of Barry Smith as a possible suspect would have resulted in an acquittal of Petitioner.

Under the present facts, the Court of Appeals departed from the standard established by this Court, and

substituted its own judgment of Petitioner's guilt for the likely result of the trial absent counsel's errors.

George Smith's claim to have been prejudiced at trial is not a claim that he has been denied the "luck of a lawless decisionmaker" as was the case in Lockhart v. Fretwell, 113 S.Ct. 838, 843 (1993). Nor does this claim of prejudice rest solely on a mere outcome determination, Id. 113 S.Ct. at 842, although the outcome at trial would likely have been different had counsel performed adequately.

Instead, as the Court stated with approval in Fretwell, Petitioner's claim is that his trial was rendered unfair and his conviction is unreliable Id., 113 S.Ct. at 844, because a good jury which almost acquitted him was denied relevant, probative, and compelling evidence that he is innocent and another specific

suspect may be guilty. As Justice O'Connor stated in her Fretwell concurrence, relying on Strickland:

> The assessment of prejudice should proceed on the assumption that the decision-maker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

113 S.Ct. at 845, citing Strickland, 466 U.S. at 695. We respectfully submit that it is reasonably probable that Petitioner's jury, with the benefit of proper and available evidence, would have acquitted him.

The substitution of the Court of Appeals of its own view of Petitioner's guilt for that of the jury which heard the evidence was improper, and inconsistent with this Court's clear directives. This Court should grant certiorari and reverse the ruling of the Court of Appeals.

PROPOSITION II.

COUNSEL'S CONFLICT OF INTEREST IMPAIRED HIS PERFORMANCE

A. The conflict of interest.

As indicated above, the codefendant Bailey wanted to testify at trial and corroborate Petitioner's account of events the day of their arrest. Bailey had Judy Strickland, the Executive Director of Youth Services at Hugo, Oklahoma, Bill Pitts, the Program Director at Recovery Way (his boss at an alcohol and drug recovery center) and G.W. Collins, the Assistant Police Chief of Hugo, Oklahoma, prepared to testify as character witnesses for him. Such witnesses from law enforcement, drug counseling and youth services would have been compelling to cast doubt upon Bailey's involvement in a criminal drug cultivating scheme.

The jury was obviously unimpressed with the evidence against Bailey, because it could come to no verdict until it reviewed the videotape.

Bailey's explanation of his own innocence was vindicated by the Court of Appeals, which reversed his conviction for lack of evidence on all counts. Appendix at 21-23. The Court of Appeals found a striking lack of evidence against Bailey. Appendix at 12. Apart from his presence at the marijuana patch on the date of his arrest, there was no other evidence of Bailey's activities, his connections or any association with the enterprise. Appendix at 14. Calling it "admittedly a close call given our standard of review" the Court of Appeals struck down the conspiracy conviction. Appendix at 17. The Court of Appeals held that no jury could find beyond a reasonable doubt that Bailey's presence

and actions on August 15 in the patch located on Smith's property made him guilty of "possessing" the marijuana or "maintaining" the drying shed. Appendix at 22-23.

Thus, the government's case against Bailey was weak. Bailey's testimony would have bolstered Petitioner's, and vice versa. Bailey was innocent and his innocence could have reinforced Petitioner's testimony.

Nevertheless, their joint counsel decided neither Bailey nor his character witnesses should testify, apparently believing that it was in Bailey's interest to remain silent. Counsel's intention was probably to distance Bailey from Petitioner, because officers testified to supposedly inculpatory statements made by Petitioner. Obviously, it was in Petitioner's interest that Bailey testify to

corroborate Petitioner's own innocence. The Court of Appeals recognized this as a technical conflict of interest. Appendix at 32-33.

B. The error of the Court of Appeals.

The Court of Appeals recognized the correct legal standard, yet failed to apply it. The Court of Appeals stated:

> "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). If a defendant can show both an actual conflict and an adverse effect, no further showing of prejudice is necessary. Strickland, 466 U.S. at 692; Cuyler, 446 U.S. at 349-50; United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).

Appendix at 30. Thereafter, the Court of Appeals held:

> That separate counsel could have "pressed" Bailey to testify, as Smith claims, is not a tactic of sufficient substance to render its unavailability an "adverse effect."

Appendix at 34.

The Court of Appeals forgot this Court's pronouncements in Cuyler:

> Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S., at 76, 62 S.Ct. at 467. Thus a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. See Holloway, supra, 435 U.S., at 487-491, 98 S.Ct., at 1180-1182.

446 U.S. at 349-50. The Court of Appeals looked for some prejudice, rather than for an adverse effect within the meaning of this Court's pronouncements.

The Court of Appeals overlooked the affidavits submitted by Bailey and his character witnesses to the effect that they wanted to testify, but did not, on the direction of joint counsel. Thus, the observation by the Court of Appeals that Petitioner could not control Bailey's decision to testify (Appendix at 33) misses the mark. All the innocent Bailey needed was encouragement to testify.

It is obviously an "adverse effect" that joint counsel decided that Bailey, although ready, willing, and able to testify, and fortified by three reputable character witnesses should not testify, whereas independent counsel could have, and would have, urged the innocent Bailey

to testify to his innocence and bolster Petitioner's testimony.

C. Other Courts of Appeals have reached the correct result.

In similar circumstances, and following remand from this Court in Cuyler, the Court of Appeals for the Third Circuit stated:

> In so concluding, we reject the Commonwealth's argument that there was no adverse effect because had Carchidi been represented by independent counsel, he would have been advised to invoke, and probably would have invoked, the fifth amendment if called as a witness. This argument seeks to require Sullivan to demonstrate prejudice. But, as we noted earlier, a defendant need not demonstrate actual prejudice to make out a violation of his sixth amendment rights where he has already established an actual conflict of interest adversely affecting counsel's performance. Cuyler v. Sullivan, 446 U.S. at 349-50, 100 S.Ct. at 1718-19. Here, it was sufficient for Sullivan to show that defense counsel consciously rejected calling Carchidi as a witness in the Sullivan trial to present Carchidi's case in

> the best light at his subsequent trial. We conclude, therefore, that the district court did not err in these crucial determinations.

Sullivan v. Cuyler, 723 F.2d 1077, 1087 (3rd Cir. 1983). This is precisely the result which should have been reached in the present case.

As another Court of Appeals has held:

> An actual conflict exists if counsel's introduction of probative evidence or plausible arguments that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing... Once we have found an actual conflict of interest, however, we have, without further inquiry, presumed prejudice to the defendant.

Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981). Ours is the flip side of the situation in Baty. In the present case, ready and probative evidence to assist Petitioner was withheld because joint

counsel presumably believed it would hurt codefendant Bailey. Clearly conflicting theories of defense presented themselves, and Petitioner's counsel's failure to urge Bailey's testimony was an "adverse effect" in the representation from which prejudice may be presumed, if prejudice were actually necessary.

Commenting on Baty in a later case, the Court of Appeals for the Eleventh Circuit stated:

> As Baty indicates, nothing in Cuyler requires proof that an actual conflict of interest adversely affect counsel's performance or impair his client's defense. 661 F.2d 391, 396. See also, Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978)("**The evil...is in what the advocate finds himself compelled to refrain from doing**"). Once a petitioner shows that his trial counsel actively represented conflicting interests, he has represented conflicting interest, he has established the constitutional predicate for an ineffective assistance claim. Cuyler, 446 U.S. at 349-50, 100 S.Ct. at 1718.

Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983).

The evil in the present case was what counsel found himself compelled to refrain from doing. He had to refrain from urging Bailey to take the stand and testify to his own innocence in order to bolster Petitioner's innocence. This adverse effect in his representation violated Petitioner's right to effective assistance of counsel, and the Court of Appeals erred and created a split in the circuits in failing to recognize it as such.

CONCLUSION

Because the Court of Appeals substituted its own view of Petitioner's guilt for the correct standard of reasonable probability of a different result given the jury's indecision, it failed to recognize Petitioner's right to counsel had been violated. Further, the Court of Appeals misconstrued the standard for an adverse effect on joint counsel's performance. The latter error creates a split in the Circuits on this important constitutional issue. The Court should grant a writ of certiorari to review these errors and should reverse the judgment of the Court of Appeals.

Respectfully submitted,

RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS

By: _____

Donald M. Bingham, OBA #794
Robert A. Nance, OBA #6581
5801 N. Broadway, Suite 101
Oklahoma City, OK 73118
(405) 843-9909
ATTORNEY FOR DEFENDANT-APPELLANT

APRIL, 1994

smithgd-1/ran

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

GEORGE DAVID SMITH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A P P E N D I X

DONALD M. BINGHAM
ROBERT A. NANCE
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
5801 N. Broadway, Suite 101
Oklahoma City, Oklahoma 73118
(405) 843-9909
ATTORNEY FOR PETITIONERS

April, 1994

*Counsel of Record

45 pp

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FILED
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
DEC. 17 1993
ROBERT L. HOECKER,
CLERK

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	Nos. 93-7007
v.	)	93-7009
	)	(E.D. Okla.)
ROBERT TROY BAILEY and	)	(D.C. Nos.
GEORGE DAVID SMITH,	)	CR-92-45-S
	)	and 1)
Defendants-Appellants.	)	

ORDER AND JUDGMENT*

Before **ANDERSON, ENGEL,** ** and **KELLY** Circuit Judges.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Albert J. Engel, Senior Circuit Judge, United States Court of Appeals, Sixth Circuit, sitting by designation.

George David Smith and Robert Troy Bailey appeal their convictions on charges of possessing with intent to distribute, conspiring, and maintaining a place to manufacture marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 846, and 856(a)(1). Although their appeals are not consolidated, we join them in this disposition for convenience. Bailey challenges the sufficiency of the evidence and, in the alternative, seeks a new trial because of an alleged conflict of interest arising from his trial counsel's dual representation of him and Smith in their joint trial. Smith raises the same conflict of interest claim among other claims of ineffective assistance of counsel. Smith also challenges the district court's decision to replay a videotape to the jury during its deliberations. We reverse Bailey's conviction on all counts and Smith's

conspiracy conviction. We affirm Smith's conviction on all other counts. We remand Smith's case for resentencing.

BACKGROUND

Viewing the evidence in the light most favorable to the government, as we must, Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Burney, 756 F.2d 787, 789 (10th Cir. 1985), the salient facts are as follows. On August 15, 1992, Smith and Bailey were caught in a marijuana patch located about 200 yards from Smith's residence in rural Choctaw County, Oklahoma. As the two men inspected the plants, law enforcement agents surprised them and placed them under arrest.

The agents were engaged in "Operation Red River," a joint effort by the Oklahoma Bureau of Narcotics (OBN), the United States Forest Services (USFS), and

the Drug Enforcement Administration (DEA). The marijuana near Smith's home had been spotted by aircraft. On August 8, 1992, agents went to the patch and determined upon inspection that the plants were being cultivated, not growing wild. The plants were spaced evenly apart, and several large plants were reinforced with black electrical tape around the bottom. The agents installed a hidden video surveillance camera at the marijuana site. The camera was triggered by an infrared sensor, which detected movement in the immediate area, and would run for eight minutes before turning off automatically.

On August 15, 1992, three agents returned to the site to check the camera and replace its tape. While there, they heard an approaching vehicle and, moments later, approaching voices. The agents hid and waited. Bailey's Appx. Vol. II-

III, at 87, 196.

Two agents testified at trial. They saw Smith and Bailey come into view and move around the marijuana patch inspecting plants, feeling them, smelling them, bending them over, and rubbing leaves between their fingers. Id. at 93, 202. The agents heard Smith make statements such as, "ought to get about twenty pounds from here," and "they're looking good over here, too," and "not any males in here either," and "I'm going to go over here and check on these smaller plants." Id. at 92-93, 199. Although the agents heard another voice, which they presumed to be Bailey's, they could not identify any of his statements. The videotape, which was introduced at trial, shows the codefendants engaged in the behavior described by the agents, but is silent as to any conversation.[1]

Eventually, when Smith moved into an area where one of the agents was hiding, the agent announced, "Federal officer." Smith started to run, but was quickly apprehended. Id. at 95. Apparently, Bailey did not move and said nothing. Both men were arrested. After receiving Miranda warnings and without interrogation, Smith made several statements including, "Am I going to lose my place?" and "I am just trying to make a living. I am tired. I am glad it's over. I know what I have done is wrong." Id. at 97-98.

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1 The camera also triggered on August 10, 1992, and recorded a partially masked individual, who the government claims is Smith, similarly inspecting and removing plants from the patch. Smith denies that he is the person in the video on August 10. He claims it was his younger brother, Barry. This factual contention is related to one of his ineffective assistance of counsel claims, discussed below.

Smith consented to a search of his house and surrounding property. In a small shed a short distance from Smith's house, agents found five marijuana plants being dried. Id. at 100-01. Also, Smith was carrying a pocketknife when he was arrested, and agents testified that the blade of the knife had green, leafy particles on it and appeared moist as if it had just cut something. Id. at 98-99. In the patch, agents found a plant still oozing from a fresh cut. Id. at 103.

Smith and Bailey were jointly indicted on drug charges, Bailey on three counts, Smith on four.[2] They hired the same

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2 Smith and Bailey were both charged with conspiracy to manufacture and possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846, possession of 217 marijuana plants with intent to distribute, in violation of § 841(a)(1), and maintaining the "drying shed" on Smith's property as "a place

attorney, Warren Gotcher, to represent them from arraignment through their joint trial. At arraignment, the trial judge advised them of their right to separate counsel, but did not inquire whether their defenses or interests might potentially conflict. Bailey's Appx. Vol. II, Tab 17, at 5-7. Both men signed and filed forms purporting to waive their right to separate representation. Id. Vol. I, Tab 2; Appellee's Appx., at 1.

The jury found Smith and Bailey guilty on all counts. At sentencing, the district court imposed terms of imprisonment on each defendant pursuant

for the purpose of ... storing ... marijuana," in violation of § 856(a)(1). Smith was charged, alone, with an additional violation of § 856(a)(1) pertaining to his residence.

to the United States Sentencing Guidelines,[3] but ordered them released pending appeal finding that the dual representation of the codefendants at trial gave rise to a "substantial question" of law "likely to result in a reversal." 18 U.S.C. § 3143(b)(1). Bailey's Appx. Vol. IV, at 34.

After sentencing, Smith and Bailey obtained new and separate counsel. They separately filed post-judgment motions for acquittal and a new trial, raising all of the issues asserted on this appeal. The district court denied all post-judgment motions without comment.

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3 Smith was sentenced to concurrent 70-month terms of imprisonment, plus concurrent four-year terms of supervised release, on each count. Bailey was sentenced to concurrent 87-month terms of imprisonment, plus concurrent four-year terms of supervised release, on each count. Neither defendant disputes the accuracy of their sentence under the guidelines.

DISCUSSION

I.

Sufficiency of the Evidence Against Bailey

Bailey contends that the evidence is insufficient to support his convictions. We agree.

We must view all the evidence, direct and circumstantial, and all reasonable inferences to be drawn therefrom, in the light most favorable to the government, and we must sustain the jury's verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Williams, 923 F.2d 1397, 1402 (10th Cir. 1990) (quoting Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)), cert. denied, 111 S. Ct. 2033 (1991). "The evidence supporting a conviction must be substantial, raising more than a mere suspicion of guilt, although the

evidence can be wholly circumstantial." Id.

The basic element of a conspiracy is an agreement among the alleged coconspirators to violate the law. United States v. Mendoza-Salgado, 964 F.2d 993, 1004-05 (10th Cir. 1992). The government must also show "that the defendant knew the essential objectives of the conspiracy, that the defendant knowingly and voluntarily took part in the conspiracy, and that the coconspirators were interdependent." United States v. Anderson, 981 F.2d 1560, 1563 (10th Cir. 1992); United States v. Evans, 970 F.2d 663, 668 (10th Cir. 1992), cert. denied, 113 S. Ct. 1288 (1993). We will not presume a defendant's involvement in a conspiracy, but we have consistently held that "the common plan or purpose may be inferred from a combination of circumstances," including the actions of the

defendants. Mendoza-Salgado, 964 F.2d at 1005; United States v. Savaiano, 843 F.2d 1280, 1294 (10th Cir. 1988). The defendant's mere presence at the crime scene or association with co-defendants does not support a conspiracy conviction, Savaiano, 843 F.2d at 1294, just as "mere proximity to illegal drugs, mere presence on the property where they are located, or mere association with persons who do control them, without more, is insufficient to support a finding of possession." United States v. Espinosa, 771 F.2d 1382, 1392 (10th Cir.), cert denied sub nom., 474 U.S. 1023 (1985). However, presence, proximity, and association are material and probative facts to be considered in conjunction with other evidence of guilt. Id. at 1393.

Reviewing the record, there is a striking lack of evidence against Bailey

as compared to Smith. The government focused almost all of its efforts on Smith. The patch was on Smith's property (or property owned by his mother that was under his control) and was about 200 yards from his house. While in the marijuana patch with Bailey on August 15, Smith talked about yield ("ought to get about twenty pounds from here"), plant quality ("they're looking good over here, too"), and plant gender ("not any males in here either"). After his arrest, he made statements tantamount to a confession, saying, "I am just trying to make a living. I am tired. I am glad it's over. I know what I've done is wrong." When searched incident to his arrest, Smith was found with a knife that appeared to have been recently used to cut a marijuana plant, and a freshly cut plant was found nearby. A shed on Smith's property contained five marijuana

plants in the process of drying. Furthermore, according to the government, Smith was shown in the video tending to plants in the patch on August 10.

In contrast to Smith, the evidence against Bailey consisted solely of his presence and conduct at the marijuana patch on August 15, as shown in the videotape and as described by the two law enforcement agents who testified. There was no other evidence of Bailey's activities, his connections, or any association with Smith or his enterprise, aside from the August 15 event. Bailey made no inculpatory statements and did not flee or otherwise resist arrest. If the government searched Bailey or his home, located some six miles from the crime scene, these searches turned up nothing that was entered into evidence. So rarely, in fact, was Bailey mentioned at trial that upon the defendants' motion

for acquittal after the government rested, the district court remarked, "What about this guy Bailey? What evidence is there about Bailey?" Bailey's Appx. Vol. III, at 289.

Even in closing argument, the government hardly mentioned Bailey, saying only that "the totality of the circumstances shows an implied agreement." Id. Vol. IV, at 377. And on appeal, we have simply seen more of the same from the government: no specific arguments about Bailey's knowledge, intent, or relationship with Smith; only repetitious, unenlightening assertions that a "conspiracy may be inferred from circumstantial evidence." Appellee's

Brief, at 39.[4]

Viewing the evidence -- the videotape and agents' testimony about August 15 -- in the light most favorable to the verdict, we can reasonably infer the following about Bailey: He was in the middle of criminal activity and he knew it. He was casually and comfortably in the company of Smith in the presence of over 200 cultivated marijuana plants. Bailey was not "merely" present, either; he was actively examining marijuana plants both independently and with Smith. Moreover, Bailey's technique in examining the plants suggests at least some familiarity with marijuana cultivation.

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4 The government filed a single, consolidated brief in response to the separately briefed and argued appeals by Smith and Bailey.

The fact that Smith trusted Bailey enough to bring him into the growing site and talk freely about production strongly suggests a preexisting or present relationship with respect to the possession and distribution of the drug. But, is that proof beyond a reasonable doubt of a conspiratorial agreement and relationship? Although it is admittedly a close call given our standard of review, we think not.

Bailey relies appropriately on Anderson, 981 F.2d at 1565. In Anderson, we reviewed the evidence supporting defendant Anderson's involvement in a conspiracy and found it insufficient to support his conviction. Id. Police watched Anderson leave a house (the "Grogan residence") with a white bowl filled with marijuana and deliver this bowl to someone else. Id. at 1562. After he was arrested, police searched

the Grogan residence and found marijuana in almost every room, totalling nearly 2,000 pounds. Id. at 1563. Police also found in the house pictures of Anderson, which were introduced to prove his relationship with the other people charged a conspiracy to distribute the marijuana. Id. In addition, one of the men seen leaving the Grogan residence earlier that day had a message left for him at his hotel to "call James," which was Anderson's first name. Id.

We reversed Anderson's conspiracy conviction because we feared that "he may well have been convicted of conspiracy because of his misfortune to conduct a one-time transaction at the Grogan residence on this particular day, " id. at 1564, and that his conviction required a piling of "inference on inference." Id.; see also Evans, 970 F.2d at 671. The evidence, we held, did not establish

that Anderson knew the scope of the conspiracy or that he knowingly and voluntarily became a part of it. Anderson, 981 F.2d at 1564. Comparing the evidence against Bailey to the evidence against Anderson, we think it would be inconsistent with our result in Anderson to find the evidence against Bailey sufficient.[5]

We noted in Anderson that "the absence of [more proof] was most likely due to

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5 The government compares the present case to United States v. Coslet, 987 F.2d 1493 (10th Cir. 1993), in which a defendant carrying various tools of cultivation as well as small amounts of marijuana, was arrested while standing in a marijuana patch. The defendant said he was looking for deer. We found the evidence sufficient to affirm his conviction for possession with intent to distribute the marijuana growing in the patch, even though he did not own the land. Id. at 1495. No conspiracy was charged in Coslet, however, and thus it sheds no light on the kind and quantum of evidence from which an illicit agreement can be inferred.

the agents serendipitously arriving in the neighborhood of the Grogan residence and the rapidity with which the activities unfolded." Id. The same stroke of luck, good or bad, befell the government in this case. They went to Smith's property on August 15 to replace the videotape in the surveillance camera, not to make arrests. It was only because Smith and Bailey entered the patch during the agents' visit that arrests were made on that day. As a result, however, "[n]o informant, undercover agent, or coconspirator testified regarding [Bailey's] involvement in the conspiracy." See id. Such "inside knowledge," while not required in every case, certainly helps "solidif[y] the evidence against each particular defendant who is charged, reinforcing the principle that 'guilt remains individual and personal.'" Id. (quoting United

States v. Kotteakos, 328 U.S. 750, 772 (1946)).

We are mindful that the evidence against Bailey "need not conclusively exclude every other reasonable hypothesis and it need not negate all possibilities except guilt." United States v. Richard, 969 F.2d 849, 856 (10th Cir.) (quoting United States v. Henry, 468 F.2d 892, 894 (10th Cir. 1972)), cert. denied, 113 S. Ct. 248 (1992). Here, however, as in Anderson, there is a failure of evidence on the record before us from which a jury could find beyond a reasonable doubt that Bailey was part of a conspiracy to grow and distribute this marijuana with Smith. We therefore reverse his conspiracy conviction.

Next, we consider whether there was sufficient proof independent of a conspiracy to support Bailey's remaining convictions for possession with intent to

distribute and maintaining a place to manufacture marijuana.[6] The government has not argued on appeal that either of these convictions can stand against Bailey absent a conspiracy. It avoided this argument at trial, we well. We infer from the government's silence that its theory of liability with respect to Bailey requires his membership with Smith in a conspiracy, which we have rejected. We therefore hold that no jury could find beyond a reasonable doubt that Bailey's presence and actions on August 15 in the patch located on Smith's property made him guilty of "possessing"

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6 To sustain these convictions, we must find, respectively, that Bailey knowingly possessed the marijuana in the patch on Smith's property with intent to distribute it, United States v. Parra, 2 F.3d 1058, 1069 (10th Cir. 1993), and that he knowingly maintained the patch for the purpose of manufacturing its crop. Williams, 923 F.2d at 1403.

the marijuana or "maintaining" the drying shed. See Anderson, 981 F.2d at 1565. We therefore reverse Bailey's remaining convictions, and we need not address his alternative arguments.

II.

Smith's Conspiracy Conviction

Smith and Bailey were the only coconspirators named in the indictment, although it also alleged other "unknown" coconspirators. Because we have reversed Bailey's conspiracy conviction, we must also reverse Smith's unless the government proved beyond a reasonable doubt the existence of one or more "unknown" coconspirators. United States v. Howard, 966 F.2d 1362, 1364 (10th Cir. 1992); United States v. Levario, 877 F.2d 1483, 1486 (10th Cir. 1989). The government has not made such a showing. Furthermore, we are unable to infer from

circumstantial evidence in the record that other coconspirators had to exist. Cf. Howard, 966 F.2d at 1364 (circumstantial evidence of an "unknown" coconspirator was sufficient) Thus, we reverse Smith's conspiracy conviction.

III.

Smith's Sixth Amendment Claims

Smith contends that he was denied his Sixth Amendment right to effective representation and seeks a new trial on this ground. Smith claims (1) that his trial counsel was constitutionally ineffective in failing to pursue certain defenses, and (2) that his trial counsel was operating under an actual conflict of interest. Although it is generally better to bring ineffective assistance claims in a 28 U.S.C. § 2255 proceeding, where an evidentiary hearing on the specific allegations can be held, see

Beaulieu v. United States, 930 U.S. 805, 806-07 (10th Cir. 1991), the parties insist and we agree that the record as it stands is sufficient for us to resolve Smith's claims.

A. Allegations of Attorney Error

In order to establish ineffective assistance of counsel, Smith must show (1) that his counsel's performance was deficient in light of prevailing professional norms and (2) that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984). In evaluating counsel's performance there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. In order to establish prejudice a defendant must generally show "a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694; cf. Lockhart v. Fretwell, 113 S. Ct. 838, 842-43 (1993) (emphasizing that prejudice also requires that errors produced an unfair or unreliable trial). We review de novo whether counsel's performance was legally deficient and whether any deficiencies prejudiced Smith. See United States v. Whalen, 976 F.2d 1346, 1347 (10th Cir. 1992); United States v. Miller, 907 F.2d 994, 997 (10th Cir. 1990).

Smith alleges that his trial counsel, Gotcher, was deficient in failing to: (1) investigate and assert as a defense that the person shown in the videotape tending the marijuana patch on August 10 was actually Smith's younger brother, Barry; (2) call a witness to rebut Smith's incriminating statements after he was arrested; and (3) move to suppress

the videotape on grounds of the Fourth Amendment or the Omnibus Crime Control and Safe Streets Act of 1968.

We go directly to the prejudice requirement on Smith's first two claims, see Strickland, 466 U.S. at 697, and hold that he cannot show prejudice as a result of these alleged deficiencies. The strong case presented against Smith did not turn on any single piece of evidence. Even if we assume without deciding that Gotcher could and should have (1) proven that the person videotaped on August 10 was Smith's younger brother, Barry, and (2) impeached the agents' testimony about Smith's post-arrest "confession" by calling another agent who was present at the time of arrest but who did not testify, the following evidence would have still pointed to Smith's guilt: His presence in the patch on August 15; the videotape

showing his actions on August 15; the agents' observations of him moving around the patch carefully tending the plants; his statements to Bailey about production ("ought to get twenty pounds out of here"), quality ("they're looking good over here, too"), and gender ("not any males in here either"); evidence that the marijuana was clearly being cultivated; the location of the patch on Smith's property near his home; the marijuana found in the drying shed; and the knife found on Smith at the time of his arrest. In light of this evidence of Smith's guilt, our confidence in the outcome is not undermined as a result of these two alleged deficiencies.

Smith's third claim of ineffectiveness, that his counsel failed to exclude the videotape, lacks merit because it alleges no error. Smith's open-field marijuana patch was not protected from silent video

surveillance either by the Fourth Amendment, Oliver v. United States, 466 U.S. 170, 180-81 (1984),[7] or the Omnibus Crime Control and Safe Streets Act of 1968. United States v. Koyomejian, 970 F.2d 536, 540-41 (9th Cir.) (en banc) (Title I does not apply to silent domestic video surveillance), cert. denied, 113 S. Ct. 617 (1992); United States v. Mesa-Rincon, 911 F.2d 1433, 1437 (10th Cir. 1990) (Title III does not apply).

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7 Smith does not contend that the marijuana patches were within the curtilage of his home. See United States v. Swepston, 987 F.2d 1510, 1513-14 (10th Cir. 1993) (discussing factors relevant to curtilage vs. open field inquiry). Smith's contention that he had an expectation of privacy in the fields surrounding his residence and curtilage because he ran cattle on those fields is meritless.

B. Conflict of Interest

Smith also contends that Gotcher's representation of him was adversely affected by a conflict of interest. The right to counsel guaranteed by the Sixth Amendment includes the "right to representation that is free from conflicts of interest." Wood v. Georgia, 450 U.S. 261, 271 (1981). "In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980). If a defendant can show both an actual conflict and an adverse effect, no further showing of prejudice is necessary. Strickland, 466 U.S. at 692; Cuyler, 446 U.S. at 349-50; United States v. Bowie, 892 F.2d 1494, 1500 (10th Cir. 1990).

As we have noted, "'[a]ctual conflict' and 'adverse effect' are not self-defining phrases." Bowie, at 1500 (quoting Cuyler, 446 U.S. at 356 n.3 (Marshall, J., concurring in part and dissenting in part). Several circuits hold that, in order to prove an "adverse effect" under the Cuyler test,

> [a defendant first] must demonstrate that some plausible alternative defense strategy or tactic might have been pursued. He need not show that the defense would necessarily have been successful if had been used, but that it possessed sufficient substance to be a viable alternative. Second, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Winkler v. Keane, No. 93-2164, 1993 U.S. App. LEXIS 26842, at *14-15 (2d Cir. Oct. 13, 1993) (emphasis added) (quoting United States v. Fahey, 769 F.2d 829, 836

(1st Cir. 1985)); United States v. Gambino, 864 F.2d 1064, 1071 (3d Cir. 1988), cert. denied, 492 U.S. 906 (1989). Though we did not attempt to define "adverse effect" for all contexts, we applied a similar test in Bowie. See Bowie, 892 F.2d at 1500.

The burden is on Smith to point to specific instances where an actual conflict adversly affected his representation. See Cuyler, 446 U.S. at 350 (possibility of conflict is insufficient); United States v. Martin, 965 F.2d 839, 842 (10th Cir. 1992) (per curiam). To this end, Smith identifies several instances that he claims meet this standard. We disagree.

First, he claims that Gotcher actively represented a conflicting interest in advising Bailey not to testify. While

technically true perhaps,[8] Smith is not entitled to relief because, even with separate counsel, Smith would not have been able to control Bailey's decision to testify.[9] See Martinez v. Sullivan, 881 F.2d 921, 930-31 (10th Cir. 1989) (A defendant is entitled to invoke his right not to testify, and once he has done so there is no way to require him to testify, separate counsel or not), cert. denied sub nom. 493 U.S. 1029 (1990).

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8 Smith testified and explained that he and Bailey were searching for a "lost goat," stumbled unknowingly into the marijuana patch, and were wholly innocent of wrongdoing. He claims that his interests would have been best served by having Bailey testify also (provided, of course, that Bailey told the same "lost goat" story). Bailey, however, followed Gotcher's advice and remained silent.

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9 We can safely assume that separate counsel for Bailey would have advised him not to testify just as Gotcher did, in anticipation of the result we reached in part I, supra.

Therefore, the joint representation had no cognizable adverse effect on Smith. That separate counsel could have "pressed" Bailey to testify, as Smith claims, is not a tactic of sufficient substance to render its unavailability an "adverse effect."

Smith claims that Gotcher was precluded by the joint representation from several other trial tactics. Specifically, he claims that Gotcher could not (1) argue a lack of evidence against Smith because it would risk emphasizing the weight of evidence against Bailey, (2) could not commend Smith for testifying because it would highlight Bailey's failure to testify, and (3) could not submit to the jury an instruction about Bailey's right not to testify because it would further discredit Bailey for not testifying. These claims are meritless as well.

The first argument would have been implausible for Smith because it belies the evidence presented at trial. See supra part I. Bailey, with separate counsel, may have benefitted from an argument comparing the weight of evidence against the two defendants, but Smith had no such argument available in his defense.

Similarly, given Smith's testimony that he and Bailey were equally and wholly innocent, it would have been implausible and against Smith's interest for his counsel, even if separate, to risk discrediting Smith's defense by calling attention to Bailey's silence, either during closing argument or in a jury instruction. Thus, Smith's second and third arguments are tactics that were foreclosed by his "united front" defense, not by any conflict of interest. Smith has not alleged that the "united front"

defense, itself, which was based on his own sworn testimony, was an adverse product of the joint representation. To the contrary, he has maintained this defense through this appeal. Appendix to Smith's Opening Brief, at 89.

Because we have found no infringement on Smith's Sixth Amendment rights, we need not consider whether he knowingly and intelligently waived those rights by filing the waiver of separate representation form.

IV.

Replaying the Video to the Jury

Smith also contends that the district court erred in allowing the jury to watch the videotape again during deliberations. This is a matter resting in the sound discretion of the trial court, United States v. Thomas, 945 F.2d 328, 330 (10th Cir.), cert. denied, 112 S. Ct.

404 (1991), and we find no abuse of discretion here.

While we have recognized that rereading of witness testimony to the jury during deliberations is "disfavored" because of the potential that the jury might "unduly emphasize" that evidence, see United States v. Keys, 899 F.2d 983, 988 (10th Cir.), cert. denied, 498 U.S. 858 (1990), we have upheld this practice where the witnesses' testimony was read in its entirety, where it was read only after the trial court instructed the jury to try to use their collective memories first, and where the court then determined that reading the testimony was "absolutely essential" for a verdict. Id.

This case presented a similar situation, although involving a videotape of alleged criminal activity rather than taped or transcribed trial testimony.

The trial judge denied the jury's initial request to review the video, explaining to jurors that "it would not be appropriate to play the video again, as it would not be appropriate to ... have [the court reporter] read one of the witnesses again ... Rather than emphasize any particular piece of evidence ... I'm going to send you back to ... continue your deliberations." Bailey's Appx. Vol. IV, at 408. Four hours later, the deadlocked jury again requested a replay, and the foreman wrote a note to the judge saying that "we feel the only evidence that is capable of persuading a change of the vote will be our viewing the videotape." Id. at 412. After discussing the matter at length with counsel for the government and defense, the trial judge decided to grant the jury's request, over defense counsel's objection. We find no abuse in the trial

judge's careful and reasonable exercise of its discretion.

Smith relies on United States v. Binder, 769 F.2d 595 (9th Cir. 1985), in which the Ninth Circuit found abuse in the district court's decision to replay videotaped testimony of a child abuse victim. Id. at 601. Binder is distinguishable, however, in several respects. First, in Binder there was no evidence of the defendant's guilt other than the videotaped testimony. Id. Here, there was ample evidence of Smith's guilt aside from the videotape. Second, the trial judge in Binder replayed only portions of the testimony that was admitted at trial. Id. Here, there was no such selective editing; the videotape was replayed in its entirety. Third, the content of the videotape in Binder was witness testimony and credibility of that witness was the central issue, which was not the case here.

CONCLUSION

For the reasons stated above, we REVERSE Bailey's conviction on all counts, and Smith's conviction on the conspiracy charge. Smith's conviction on the three remaining counts is AFFIRMED. Smith was originally sentenced to four concurrent terms of 70 months imprisonment, which was at the midpoint of the applicable guideline range of 63 to 78 months (based on a base offense level of 26 and a criminal history of I). Although it is unlikely that a reversal of one of four counts underlying his present concurrent sentences will alter Smith's sentence, the possibilty exists that the district court could

sentence at a lower point within the guideline range. Accordingly, we REMAND for resentencing.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	
	)	No. 93-7009
v.	)	
	)	
GEORGE DAVID SMITH,	)	
	)	
Defendant - Appellant.	)	

ORDER
Entered February 2, 1994

Before SEYMOUR, Chief Judge, ENGEL*, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges.

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*The Honorable Albert J. Engel, Senior Circuit Judge, United States Court of Appeals, Sixth Circuit, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT H. HOECKER, Clerk

By:
Patrick Fisher
Chief Deputy Clerk